SUPPORTING BRIEF

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

The Court of Criminal Appeals of Texas committed fundamental error in affirming the judgment of the trial court because

1) The ordinance in question is unconstiutional and void on its face because it is in excess of the police power and makes unlawful that which is, per se, innocent and lawful, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

2) The ordinance in question is unconstitutional and void on its face because it denies and deprives petitioner of her right of freedom of the press in that it prohibits "press activity" on the main streets of the city, contrary to the First and Fourteenth Amendments to the United States Constitution.

3) The ordinance in question is unconstitutional and void as construed and applied because it denies petitioner of her rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

4) The ordinance in question is unconstitutional and void on its face (Sec. 4) because it discriminates and confers special privileges upon one class of citizens and denies the same privileges to other persons similarly situated, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

5) Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly denies petitioner her inalienable and inherent right to the writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

The Court of Criminal Appeals and the trial courts have so construed this ordinance as to include within the terms, "any character of property whatever", literature containing information and opinion; thereby the ordinance is void on its face and unconstitutional.

It is a fundamental proposition that the streets of villages, towns and cities are dedicated to public welfare; that no particular person or class of persons can be denied the use thereof for any lawful or constitutional purpose. The proper rule was laid down by this Court in *Schneider* v. *State,* 308 U. S. 147, as follows:

> "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.
>
> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. . . .
>
> " . . . Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. . . .
>
> " . . . But as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

See also *Hague* v. *C. I. O.,* 307 U. S. 496, 501, 518, where this

Court said: "But it must not in the guise of regulation be abridged or denied." See also *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106.

The fact that the petitioner was charged with selling literature in the prohibited area does not change the rule, for the right of free press is not limited to "free of charge" distribution upon the streets, but extends to literature sold or for which contributions are received. The ordinance in question here goes further and prohibits the exchange of literature.

It is not a regulatory ordinance as to time and place, nor is it contended that petitioner occupied any part of the sidewalk or public streets to the exclusion of all others, but the undisputed evidence simply shows that she walked about the streets distributing by hand the literature in question.

The statement made by Mr. Justice Reed in the *Jones* v. *City of Opelika,* 62 S. Ct. 1231, case is appropriate here, "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid."

Even when applied to commercial peddling of ordinary articles of merchandise the ordinance in question comes clearly within the prohibition of the above named cases and there is no valid reason that can be advanced to sustain the validity of the ordinance. See Freund's "The Police Power", page 133.

But if it be assumed that under ordinary application, the ordinance be proper exercise of the police power, it is not justification for prohibition of the sale of literature, because then it runs counter to the Constitution. As this Court said in *Schneider* v. *State,* supra, such regulation might be valid when directed at ordinary business, but invalid when directed against the exercise of rights so vital to the maintenance of democratic institutions. See also *Eubank* v. *Richmond,* 226 U. S. 137, *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U. S. 613, 622, where it was held that

the police power of a State has its limits and must stop when it encounters the prohibitions of the Federal Constitution.

The prohibition of the use of the streets is unconstitutional because constitutional guarantees cannot be made to yield to mere convenience. *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402.

The State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Smith* v. *Texas*, 233 U. S. 630.

A municipal ordinance, which narrows the limits within which gas works may be erected and maintained so as to exclude from the privileged territory property purchased for that purpose and on which such works were being erected, constitutes an arbitrary and unjustifiable interference with property rights where such change is not demanded by the public welfare. *Dobbins* v. *Los Angeles*, 195 U. S. 223.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25, this Court said:

> "The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local government agency acting under the sanction of State legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on acknowledged police powers of a State, must always yield in case of conflict with the processes under the Constitution, or with any right which that instrument gives or secures." [4]

---

[4] *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinot* v. *Davenport*, 22 How. 227, 243; *Missouri, K. & T. Ry. Co.* v. *Baber*, 169 U. S. 613, 626.

Although the ordinance does not, within its prohibitive terms, expressly name all the main streets that extend from the business section to the city limits, nevertheless, by including within its prohibitive terms all the streets that are adjacent to the Plaza, that has been accomplished, because all the main streets of Paris and places where one would likely desire to exercise press activity would be on such streets adjacent to the Plaza and not in the out-of-the-way streets that are desolate of travelers. The streets near the Plaza include all the entire business district and which are the only places within the limits of the city where people come in great numbers to shop, attend theaters, make purchases on the market and do other business at nighttime and particularly all day Saturday and Saturday night. It is at such times that one desiring to disseminate information and opinion would exercise his press activity. If he is denied the right to exercise such activity in or around the Plaza, then he in fact has been denied the right to exercise such right within the city, for one would not desire to stand on a desolate street corner in the residential area, where only few or no people pass, to distribute literature. In fact, the officials of the City of Paris have stated, 'These named "appropriate places" are denied you for the purpose of exercising your liberty because "it may be exercised in some other place" such as in the unused residential area and other places in the city which are not frequented by visitors.' This is exactly what was condemned by this Court in *Schneider* v. *State,* supra.

The Court of Criminal Appeals admits that if the ordinance was invalid on its face, it was their duty to reverse the judgment of the District Court and order the writ granted and the relator discharged. In fact this was done in the companion case of *J. D. Carter,* 156 S. W. 2d 986, where the identical activity as carried on by petitioner here was the basis of the conviction there. The ordinance in question is a bald, outright prohibition and arbitrary denial of

the proper and legal use of the streets for the purpose of dissemination of information and opinion.

The *so-called* non-federal question is fictitious and colorless and without foundation in fact or law and the holding on the procedural question is in direct conflict with *Ex parte Lewis,* 45 Tex. C. R. 1, 73 S. W. 811; *Ex parte Faulkner,* 158 S. W. 2d 525; *Ex parte Baker,* 78 S. W. 2d 610; *Ex parte Spelce,* 119 S. W. 2d 1033, 1037; *Ex parte Slawson,* 141 S. W. 2d 609, 610; *Ex parte J. D. Carter* (one of Jehovah's witnesses and companion case to this in the Court of Criminal Appeals), 156 S. W. 2d 986; *Ex parte Roquemore,* 131 S. W. 1101; *Ex parte Jones,* 81 S. W. 2d 706; *Ex parte Patterson,* 58 S. W. 1011, 42 Tex. C. R. 256. See footnote, p. 22.

Judge Hawkins, speaking for the majority of the Court of Criminal Appeals, makes the statement that if petitioner was dissatisfied with the findings of fact of the Corporation Court she should have availed herself of an appeal to the County Court from the Corporation Court. This statement is impertinent and immaterial because the petitioner claimed throughout that the ordinance is unconstitutional and void both on its face and as construed and applied and she does not complain as to the findings of fact because the undisputed evidence showed that she was engaged in an activity protected by the Constitution and that the ordinance as construed deprived her of that right. In these circumstances and under the prevailing practice of Texas, if the ordinance was unconstitutional for any reason, it was unnecessary that she appeal to the County Court but she had the right to apply immediately to the District Court for writ of habeas corpus. See the foregoing cases last cited and the dissenting opinion of Judge Graves of the Court of Criminal Appeals in this case. R. 28-35.

Furthermore this rule announced by Judge Hawkins, even when his reasoning is followed as to the appropriateness of the habeas corpus remedy to question constitutionality as construed, would not apply, if this Court reaches the

conclusion that the ordinance in question is unconstitutional on its face. In that event the writ should be granted, says Judge Hawkins.

On the question of jurisdiction of this Court and to show that the holding of the Court of Criminal Appeals is not based on an independent, adequate, non-federal question, but that such *so-called* non-federal question is intermingled with the constitutional rights of petitioner and is also colorless and fictitious and arbitrary holding and evasive of the real issue.[5]

In this, as well as companion cases of *Ex parte Killam* and *Ex parte Hilley* in the Court of Criminal Appeals (also brought to this Court as companion cases on petitions for writ of certiorari) it is significant that the Court of Criminal Appeals did not dismiss the appeals for want of jurisdiction, as it would have done under the prevailing practice, had that court seriously believed that it did not have jurisdiction. If an appellate court does not have jurisdiction, as contended by the Court of Criminal Appeals, it would be obligated to sustain the motion to dismiss the appeal made by the State's Attorney in these cases. On the contrary, that court ignored the State's Attorney's motion to dismiss and affirmed the judgments of the trial courts in the three cases, remanding the petitioners to custody, thereby showing that the Court of Criminal Appeals considered the cases on the merits and that the *so-called* non-federal question is absolutely colorless and fictitious. The trial courts decided the cases on the merits and held the ordinances constitutional and found petitioners had not been denied their constitutional rights. The Court of Criminal Appeals affirmed the holding of the trial courts, therefore it cannot be said that the disposition

[5] See the following cases: *People ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 66-69, 70-71; *Rogers* v. *Alabama*, 192 U. S. 226, 230, 231; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Love* v. *Griffith*, 266 U. S. 32; *New York Central Ry. Co.* v. *New York & Pennsylvania*, 270 U. S. 124, 126, 127; *German Savings & Loan Soc.* v. *Dormitzer*, 192 U. S. 125, 128; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 473, 475-476; *Brown* v. *Mississippi*, 297 U. S. 278; *Patterson* v. *Alabama*, 294 U. S. 600, 603-607.

made of these three cases is based on an adequate non-federal question.

We make reference to and incorporate herein the argument made in the supporting brief of each of the companion cases styled *Hilley* v. *Spivy* and *Killam* v. *Floresville.*

Because the matter is *exactly in point,* we here call attention to the case of *Ex parte Walrod,* 120 P. 2d 783, an original habeas corpus action—decided by the Criminal Court of Appeals of Oklahoma Dec. 23, 1941, where that court had before it for review the case of one of Jehovah's witnesses who had been unlawfully imprisoned and restrained of his liberty in the city jail of Stillwater, Oklahoma, for the alleged violation of Ordinance No. 611 of that city, holding unlawful the distribution of literature "on the streets and sidewalks of the congested business district of the City of Stillwater, Oklahoma, and said congested business district is defined as being the territory included from Fifth avenue to Eleventh avenue and between Hudson Street and Lewis Street." There the Criminal Court of Appeals, in discharging petitioner, held the ordinance to be unconstitutional and void under the First and Fourteenth Amendments to the Constitution of the United States because such ordinance denied the rights of freedom of the press, speech and worship, being a prohibition of and direct burden on such rights.

See also *Ex parte Winnett et al.,* 121 P. 2d 312, also an original habeas corpus action decided by the Criminal Court of Appeals of Oklahoma on January 7, 1942, where four of Jehovah's witnesses were restrained of their liberty in the city jail of Shawnee, Oklahoma, for the alleged violation of an ordinance of that city prohibiting the distribution of literature of any kind at any time on the streets of the city of Shawnee. Here the Criminal Court of Appeals likewise rightly found such ordinance unconstitutional and void, being an outright denial of freedom of speech, press and worship guaranteed by the Constitution of the United States and discharged petitioners.

What is here done by the Court of Criminal Appeals of Texas and the District Court of Lamar County in construing the terms of the ordinance in question to be valid and to include the distribution of literature containing information and opinion, has for its basis the same reasoning that was employed by this Court in the majority opinion in *Jones* v. *City of Opelika,* supra. The courts below in this case hold that one who "sells" literature can be denied his constitutional rights.

The courts below admit that an ordinance is invalid on its face when expressly prohibiting the distribution of literature free and without charge, but hold that when an ordinance prohibiting selling, bartering, or exchanging "any character of property whatever" is wrongly construed and applied to one engaged in distributing literature it is valid.* *This is a distinction,* without a difference. The ordinance here, on its face, and as its terms are construed by the courts below, expressly prohibits absolutely the exercise of fundamental personal rights within the business district of the city of Paris.

If the Court finds that this ordinance is unconstitutional on its face, and as its terms have been construed, then, a fortiori, according to the admission of the Court of Criminal Appeals, that court should have considered the application for writ of haeas corpus.

If the holding of the Court of Criminal Appeals is sustained, then an increased burden of appeals to this Court becomes necessary in cases involving Jehovah's witnesses from the 254 counties of Texas, because of the action of the Court of Criminal Appeals in attempting to escape and avoid its responsibility under the Constitutions of Texas

---

* Compare Court of Criminal Appeals words in *Ex parte Baker,* 127 Tex. C. R. 589, 78 S. W. 2d 610, 613, to wit: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In this case the writ was sustained.

and the United States, to protect rights secured by the United States Constitution to its citizens in Texas.

The ordinance is clearly invalid on its face and for this reason the judgment of the Court of Criminal Appeals should be reversed.

If the argument presented herein (together with that presented in the companion cases of *Hilley* v. *Spivey* and *Killam* v. *City of Floresville*) is given thoughtful consideration by the Court, the conclusion will be inescapable that this Court has jurisdiction and that the petition for certiorari should be granted and the judgment and decision of the Court of Criminal Appeals of Texas should be set aside and held for nought.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under 240(a) of the Judicial Code, 28 U. S. C. A. 347(a) and Rule 38, par. 5, of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of committed by, and the judgments rendered by, the Court of Criminal Appeals and the trial courts, against petitioner.

Respectfully submitted,

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn, New York

Attorney for Petitioner